No. 87-168

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

RUSSELL FRISBY, *et al.*,
Appellants,

v.

SANDRA C. SCHULTZ, *et al.*,
Appellees.

On Appeal From the United States Court of Appeals for the Seventh Circuit

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BRIEF OF THE NATIONAL LEAGUE OF CITIES, INTERNATIONAL CITY MANAGEMENT ASSOCIATION, U.S. CONFERENCE OF MAYORS, AND NATIONAL ASSOCIATION OF COUNTIES AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS

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QUESTION PRESENTED

Whether a content-neutral ordinance restricting picketing upon property immediately adjacent to private homes in a residential neighborhood is valid under the First Amendment.

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INTEREST OF THE *AMICI CURIAE*

The *amici*, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments.

This case presents the question whether the First Amendment precludes a small residential suburb's effort to prohibit picketing in areas immediately adjacent to homes to preserve for its citizens the domestic tranquility they cherish and to protect public safety and convenience. The Town of Brookfield, a "bedroom" suburb of the City of Milwaukee, adopted an ordinance prohibiting picketing "before or about the residence or

dwelling of any individual." J.S. App. A-8. The ordinance was passed in reaction to complaints about group picketing in front of the family home of a physician who performed abortions at facilities in Appleton and Milwaukee. The declared purposes of the ordinance include "protection and preservation of the home"; the "well-being, tranquility, and privacy" of the neighborhood; and the avoidance of "obstruct[ion] and interfere[nce] with the free use of public sidewalks and public ways of travel." *Ibid.* The district court enjoined enforcement of the ordinance, and the Court of Appeals for the Seventh Circuit, sitting *en banc*, affirmed by an equally divided court.

Amici's principal concern relates to the district court's broad assumption that every street, regardless of size, location, or character, is a "public forum" for the exercise of all forms of free speech. *Amici* submit that in determining the extent of permissible regulation of speech-related conduct on streets, the character of the streets should be weighed in the balance together with the kind of activity that is restricted.

Amici are also concerned with the district court's narrow view of the Town's authority to preserve the quality of life of its residents. This Court has recognized the strong interest of state and local governments in preserving the quality of community life (*see City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986)), and the tranquility of citizens in their homes (*see Carey v. Brown*, 447 U.S. 455, 470 (1980); *id.* at 477 (Rehnquist, J., dissenting)). Brookfield's limited action aimed at disruptive conduct within a particular area should not be invalidated simply because the ordinance may have some minimal impact on the exercise of free speech. Such a rationale would have been grounds to invalidate many, if not all, of the restrictions on picketing and other expressive activity upheld by this Court.

The Court's decision in this case will reach matters of fundamental concern to *amici* and their members. The claim may always be made that restrictions on picketing will limit free speech; but in appropriate contexts those restrictions are upheld nevertheless. Because of the importance of these issues, *amici* submit this brief to assist the Court in its resolution of the case.[1]

STATEMENT OF THE CASE

This action was brought under 42 U.S.C. 1983, seeking declaratory and injunctive relief against the alleged deprivation of appellees' First and Fourteenth Amendment rights by an ordinance of the Town of Brookfield, Wisconsin, that prohibits "picketing before or about the residence or dwelling of any individual in the Town of Brookfield." J.S. App. A-8.

Brookfield is a small suburb of Milwaukee, Wisconsin. The Town covers an area of about five-and-a-half square miles and has a population of about 4,300. *Id.* at A-6; J.A. 49. Except for State Highway 18, a commercial thoroughfare, the Town is residential. J.A. 49. Dr. Benjamin Victoria and his family live in a home in a residential subdivision zoned exclusively for single-family residences. J.S. App. A-5 to A-6. The streets are thirty feet wide, although they become partially obstructed in the winter by snowbanks. *Id.* at A-6. There are no sidewalks, curbs, gutters, or street lights. *Ibid.*

The appellees challenging this ordinance are members of the Milwaukee Coalition for Life, an anti-abortion activist group. J.A. 33-35. Between April 20 and May 20, 1985, the Coalition sponsored six picket lines in front of the Victoria family residence to publicize and protest the

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[1] Pursuant to Rule 36 of the Rules of this Court, the parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court.

fact that Dr. Victoria, who does not practice medicine in Brookfield, performed abortions at clinics in Appleton and Milwaukee. J.S. App. A-5 to A-6. The number of pickets ranged from eleven to more than forty. *Id.* at A-6. They carried signs such as "Stop Abortion Now," "Aborted Babies Sold For 'Cosmetics,'" and "Abortion Is Legal Murder," and shouted slogans like "Dr. Victoria, you're a killer." J.S. App. A-10 to A-12; J.A. 89-92. Picketers talked with passersby and frightened at least one child by the statement that a man who lived up the road killed babies. J.S. App. A-11 to A-12. On occasion, they blocked Victoria family members' entrance to and exit from their home. *Id.* at A-11. Appellees claim that the First Amendment deprives the Town of the power to prevent this picketing.

The Town ordinance declares "that the protection and preservation of the home is the keystone of democratic government; that the public health and welfare and the good order of the community require that members of the community enjoy in their homes and dwellings a feeling of well-being, tranquility, and privacy"; "that the practice of picketing before or about residences and dwellings causes emotional disturbance and distress to the occupants; obstructs and interferes with the free use of public sidewalks and public ways of travel; that such practice has as its object the harassing of such occupants; and without resort to such practice full opportunity exists . . . for the exercise of freedom of speech and other constitutional rights; . . . ." *Id.* at A-8.

The United States District Court for the Eastern District of Wisconsin granted appellees' motion for a preliminary injunction against enforcement of the ordinance. A panel of the Court of Appeals for the Seventh Circuit affirmed, 2 to 1. After rehearing *en banc*, the Court of Appeals divided equally to affirm, without opinion, the judgment of the district court.

SUMMARY OF ARGUMENT

In *Carey v. Brown*, 447 U.S. 455, 459 n.2 (1980), this Court expressly left open the question "whether a statute barring all residential picketing regardless of its subject matter would violate the First and Fourteenth Amendments." In that case, the Court struck down under the Equal Protection Clause an Illinois statute prohibiting picketing of residences or dwellings, but exempting labor picketing. The Court, however, explicitly cautioned that "[w]e are not to be understood to imply . . . that residential picketing is beyond the reach of uniform and non-discriminatory regulation. For the right to communicate is not limitless." *Id.* at 470. Indeed, the Court continued, "[t]he State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society." *Id.* at 471. This case squarely presents the issue whether a content-neutral ordinance restricting picketing upon property immediately adjacent to private homes in a residential area is valid under the First Amendment.

I. The Brookfield ordinance should be upheld because it is a content-neutral, reasonable restriction upon speech-related conduct, given the character and purpose of the limited zone within which the restriction applies. Although it may be helpful to the analysis in some cases to determine, as a threshold matter, whether property subject to a limitation upon expressive activity is a "public forum" or a "non-public forum," a number of decisions of this Court indicate that such categorization is not always required. Ultimately, First Amendment analysis depends not upon the label assigned to the property, but rather upon the degree to which the expressive activity at issue is "basically incompatible" with the place in which it is carried out. *See, e.g., Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972). This inquiry is essentially the same, whether the forum is "public" or "non-public."

Such an analysis of the facts of this case reveals that picketing is indeed "basically incompatible" with the character of the residential streets of Brookfield. The ordinance is therefore a reasonable limitation upon expressive activity consistent with the First Amendment. The Court's determination whether residential streets are a "non-public forum" is less important in reaching this conclusion than a careful inquiry into the fit between the characteristics of the forum and the expressive activity involved in this case.

The reasonableness of Brookfield's picketing ordinance is established by the significant governmental interests directly advanced by its enforcement. Group picketing upon the narrow residential streets of Brookfield not only is inherently disruptive of residential tranquility, and inherently coercive and intimidating, but also poses significant physical hazards to those using Brookfield's residential streets. These streets simply are not designed or intended to facilitate regular massing of even a handful of individuals for protest purposes. Brookfield may reserve these streets for their intended use (*see Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983)) and prohibit group picketing, which necessarily undermines residential tranquility and privacy, as well as public safety and convenience.

II. Even if the Court concludes that Brookfield's residential streets constitute a traditional public forum, the ordinance is a permissible regulation of the place and manner of expressive activity. *See Perry Education Ass'n*, 460 U.S. at 45. The ordinance is content-neutral, making absolutely no distinction with respect to the subject matter or viewpoint of the picketing. The ordinance is narrowly tailored to the particular type of expressive activity posing a danger to the tranquility of the neighborhood, the privacy of its citizens, and the public safety concerns of the Town. Appellees have ample alternative means of expression to make their views known. The

ordinance does not prohibit picketing in Brookfield other than "before or about" residences, and, of course, has no application to picketing at Dr. Victoria's clinics because they are not located in Brookfield. Neither does the ordinance prohibit appellees from marching through Brookfield; nor does it affect neighborhood leafletting and solicitations, meetings and rallies in parks and homes, or the use of the mail, telephone, radio, television, and newspapers. Finally, the ordinance may be compared in its effect to zoning restrictions designed to preserve the character of a neighborhood, which have been upheld by this Court even when they limit the location of activity protected by the First Amendment. *See, e.g., City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986).

I. A CONTENT-NEUTRAL ORDINANCE RESTRICTING PICKETING UPON PROPERTY IMMEDIATELY ADJACENT TO PRIVATE HOMES IN RESIDENTIAL AREAS IS REASONABLE IN LIGHT OF THE CHARACTER AND PURPOSE OF SUCH PROPERTY.

A. Property Immediately Adjacent To Private Homes In Residential Areas Is Properly Subject To Neutral And Reasonable Restrictions Upon Speech-Related Conduct.

This case concerns the power of a local community to prohibit picketing "before or about the residence or dwelling of any individual." J.S. App. A-8. The extent to which expressive activity may be restricted upon such property depends upon an evaluation of its particular character and purpose. "The existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue." *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44 (1983).[2] As this Court observed in

[2] Since *Perry Education Ass'n*, First Amendment cases raising questions of access to public property have tended to evaluate first

Grayned v. City of Rockford, 408 U.S. 104, 116 (1972) (emphasis added) (citation and footnote omitted):

> The nature of a place, "the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable." . . . The crucial question is whether the manner of expression is *basically incompatible* with the normal activity of a particular place at a particular time.

See also Lehman v. City of Shaker Heights, 418 U.S. 298, 302-03 (1974) ("the nature of the forum and the

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the character and purpose of the property at issue to determine whether it is a "public forum" or a "non-public forum." That determination results in the application of different standards of review, either a heightened scrutiny or a reasonableness standard, to decide whether the restriction upon expressive activity violates the First Amendment. *Compare Cornelius v. NAACP Legal Defense & Education Fund, Inc.*, 473 U.S. 788 (1985), *with Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984). It would seem, however, that although labeling particular property "public" or "non-public" at the outset may be analytically helpful in some cases, First Amendment analysis ultimately must focus upon whether the expressive activity restricted is "basically incompatible" with the forum, public or otherwise. *See Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972). Indeed, it may be that forcing all types of public property into boxes labeled "public forum" or "non-public forum" is unnecessary and obscures the analysis whether any particular restriction upon expressive activity is warranted. *See, e.g., Taxpayers for Vincent*, 466 U.S. at 815 n.32 (questioning utility of public forum analysis in certain cases).

The words "public" and "non-public" may, in effect, do no more than express summarily the Court's conclusion regarding the suitability of a particular forum for particular expressive activity. Thus, *amici* submit that these categories should not be transformed into outcome-determinative molds that foreclose a thorough analysis of the fit between the particular forum and the form of expression at issue. The analysis in this part of the brief, while urging that Brookfield's residential streets are a "non-public" forum, also suggests that the Court may uphold the challenged ordinance without engaging in a lengthy preliminary inquiry to that effect.

conflicting interests involved have remained important in determining the degree of protection afforded by the [First] Amendment to the speech in question"); *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 650-51 (1981) ("consideration of a forum's special attributes is relevant to the constitutionality of a regulation since the significance of the governmental interest must be assessed in light of the characteristic nature and function of the particular forum involved").

The compatibility of a particular form of expression with a particular location is "the crucial question" in First Amendment analysis (*Grayned*, 408 U.S. at 116) because the First Amendment provides no blanket privilege for all forms of expression in all locations. "Even protected speech is not equally permissible in all places and at all times." *Cornelius v. NAACP Legal Defense & Education Fund, Inc.*, 473 U.S. 788, 799 (1985). "[T]he First Amendment does not guarantee access to property simply because it is owned or controlled by the government." *United States Postal Service v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 129 (1981). Thus, while the government's power to limit expressive activity is narrowly circumscribed when "a principal purpose of [the property] is the free exchange of ideas" (*Cornelius*, 473 U.S. at 800), other types of public property may be treated differently:

> Public property which is not by tradition or designation a forum for public communication is governed by different standards. . . . In addition to time, place, and manner regulations, the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view.

Perry Education Ass'n, 460 U.S. at 46. In sum, the *Perry*, *Grayned*, *Lehman*, *and Heffron* decisions require a particularized examination of the customary or offi-

cially designated characteristics of the specific forum at issue to determine whether a particular restriction upon expressive activity may be deemed reasonable.

The Brookfield ordinance at issue in this case applies only to property immediately adjacent to private homes in a residential area. The streets of Brookfield are within a subdivision zoned exclusively for single-family residences. The road surfaces are approximately 30 feet wide (although not all usable during the winter); and there are no sidewalks, curbs, gutters, or street lights. J.S. App. A-6. There is not a scintilla of evidence to indicate that these streets traditionally have been used or considered as places for public gatherings and protests. Given the character of the streets, it would strain credulity to assert that they were designed, built, or designated by Brookfield as a public forum for communication. These residential streets provide access to single-family dwellings; they are not gathering spots for public debate.

The fact that streets in other places under other circumstances may be considered traditional public forums for the free exchange of ideas does not mean that streets in the residential subdivisions of Brookfield must be similarly classified.[3] As Justice Frankfurter wrote:

> Where does the speaking which is regulated take place? Not only the general classifications—streets, parks, private buildings—are relevant. The location and size of a park; its customary use for the recreational, esthetic and contemplative needs of a community; the facilities, other than a park or street corner, readily available in a community for airing views, are all pertinent considerations in assessing the limitations [of] the Fourteenth Amendment . . . .

[3] Indeed, some courts have found that residential streets are not public forums. *See, e.g., Pursley v. City of Fayetteville*, 628 F. Supp. 676 (W.D. Ark. 1986); *see also Garcia v. Gray*, 507 F.2d 539 (10th Cir. 1974), *cert. denied*, 421 U.S. 971 (1975).

Niemotko v. Maryland, 340 U.S. 268, 282-83 (1951) (Frankfurter, J., concurring). Streets have different characteristics and purposes, just as parks and buildings do. This Court has on occasion referred to "streets" and "parks" as examples of traditional public forums (*e.g.*, *Hague v. CIO*, 307 U.S. 496, 515 (1939)), but a street or park is not a public forum simply because it is a street or park. If it is a public forum, it is because of its use or suitability for open speech and debate. The streets around Madison Square Garden and those around Brookfield's homes do not share similar characteristics pertinent to their status as public forums; they must be evaluated as forums for expression according to their particular character and purpose, like all other public property.[4]

This Court has declared that "[w]e will not find that a public forum has been created in the face of clear evidence of a contrary intent, nor will we infer that the government intended to create a public forum when the nature of the property is inconsistent with expressive activity." *Cornelius*, 473 U.S. at 803 (citations omitted) (Combined Federal Campaign charity drive not a public forum). *See also Perry Education Ass'n*, 460 U.S. at 48 (school district's internal mail system not a public forum); *Greer v. Spock*, 424 U.S. 828, 838 (1976) (mili-

[4] *See, e.g., Grayned v. City of Rockford*, 408 U.S. at 120 n.45:

> Different considerations, of course, apply in different circumstances. For example, restrictions appropriate to a single-building high school during class hours would be inappropriate in many open areas on a college campus, just as an assembly that is permitted outside a dormitory would be inappropriate in the middle of a mathematics class.

See also FCC v. Pacifica Foundation, 438 U.S. 726, 750 (1978) (applying, in a First Amendment context, the rationale for regulating a nuisance: A "'nuisance may be merely the right thing in the wrong place,—like a pig in the parlor instead of the barnyard.' *Euclid v. Ambler Realty Co.*, 272 U.S. 365 [(1926)].").

tary reservation not a public forum); *Lehman v. City of Shaker Heights*, 418 U.S. at 304 (advertising space on city buses not a public forum); *Adderly v. Florida*, 385 U.S. 39, 48 (1966) (jailhouse grounds not a public forum). The Town of Brookfield clearly intended that its residential streets should not be public forums (see declaration accompanying ordinance, J.S. App. A-8), and the very nature of those streets plainly indicates that picketing would be inconsistent with their character and purpose. Accordingly, *amici* submit that the residential streets at issue in this case are not a public forum and are properly subject to neutral, reasonable limitations upon speech-related conduct.

B. Brookfield Reasonably Determined That Property Immediately Adjacent To Private Homes In Residential Areas Should Be Protected From Picketing.

"The reasonableness of the Government's restriction of access to a nonpublic forum must be assessed in the light of the purpose of the forum and all the surrounding circumstances." *Cornelius*, 473 U.S. at 809. The prohibition of picketing upon property immediately adjacent to private homes in residential areas is reasonable in light of the interests in domestic tranquility, privacy, public safety, and convenience that it serves. A reasonable restriction "need not be the most reasonable or the only reasonable restriction." *Id.* at 808. In particular, reasonableness does not depend on "a finding of strict incompatibility between the nature of the speech . . . and the functioning of the nonpublic forum." *Ibid.*

Brookfield's picketing ordinance directly furthers residential tranquility and privacy, an interest that "is certainly of the highest order in a free and civilized society." *Carey v. Brown*, 447 U.S. 455, 471 (1980).[5]

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[5] *See also Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974) ("The police power . . . is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and

The First Amendment has never been interpreted to preclude enforcement of reasonable, content-neutral limitations upon speech-related conduct that disturbs zones where peace and tranquility are important. No one would question under the First Amendment the police power of the State to restrict expressive activity in bird sanctuaries or zoological parks where such activity disrupts the tranquility of the birds and animals in their habitats. *Amici* respectfully suggest that the residents of Brookfield are entitled to enforce similar protections in their residential neighborhoods.

The picketing in this case illustrates the type of behavior properly proscribable in the interests of residential tranquility and privacy. The picketers, sometimes numbering more than 40 persons, massed repeatedly in front of Dr. Victoria's family home. J.S. App. A-5 to A-6. Cars and buses filled with picketers arrived in the neighborhood, harassing, obstructing, and intimidating the doctor's wife and children and their neighbors with picket signs and taunts. J.S. App. A-10 to A-12; J.A. 42, 68-72. At least one neighborhood child was so frightened after being told that a "baby killer lived nearby" that he would not leave his grandparent's home for the remainder of the day. J.S. App. A-12. Surely it was reasonable for Brookfield residents to find that the repeated intrusions of strangers patrolling in this manner in front of their homes for hours on end disrupted the tranquility of their neighborhood and deprived them of their privacy.

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clean air make the area a sanctuary for people"); *Gregory v. Chicago*, 394 U.S. 111, 118 (1969) (Black, J., concurring) ("[N]o mandate in our Constitution leaves States and governmental units powerless to pass laws to protect the public from the kind of boisterous and threatening conduct that disturbs the tranquility of spots selected by the people either for homes, wherein they can escape the hurly-burly of the outside business and political world, or for public and other buildings that require peace and quiet to carry out their function . . . .").

In addition to serving Brookfield's substantial interest in the tranquility and privacy of its residential neighborhood, the picketing ordinance also helps ensure the safety and convenience of those who use Brookfield's residential streets. As described above, the streets were not designed or intended to accommodate regular massing of even a handful of individuals for protest purposes; there are no curbs, sidewalks, or street lights to facilitate any pedestrian traffic. The streets' design and construction indicate that their purpose is simply to accommodate the residents' automobile transportation to and from their homes.

The physical character of Brookfield's residential streets justifies prohibiting picketing thereon to protect the safety of those using the streets. Because of the absence of curbs and sidewalks, nothing delineates where cars may travel and picketers patrol, thus distracting drivers and endangering picketers. Picketing necessarily disrupts and impedes automobile traffic on narrow roads. It forces pedestrians, especially young children and senior citizens who are more likely to be walking than traveling by automobile, to walk farther out onto the road to get around the crowd of picketers and may make them reluctant to use the streets of their neighborhood. These dangers are increased when the cars and buses that bring picketers into the neighborhood are parked on the streets; at night, because of the absence of street lighting; and during winter months, when snowbanks along the streets make them even narrower. See J.S. App. A-6; J.A. 68-72. Indeed, the very fact that picketers apparently must stand in the street itself in order to avoid trespassing upon private property demonstrates as clearly as any other fact the reasonableness of the Brookfield ordinance.

The power of local governments to control streets for public safety purposes is very broad:

> The control of travel on the streets is a clear example of governmental responsibility to ensure this necessary order. A restriction in that relation, designed to promote the public convenience in the interest of all, and not susceptible to abuses of discriminatory application, cannot be disregarded by the attempted exercise of some civil right which, in other circumstances, would be entitled to protection.

Cox v. Louisiana, 379 U.S. 536, 554 (1965). *See also Cox v. New Hampshire*, 312 U.S. 569, 574 (1941) ("the authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend"). Of course, Brookfield could prosecute individuals who are caught obstructing streets, but the Town may also take account of likely safety hazards posed by picketing on residential streets and prohibit it before a tragedy occurs.[6] The numerous public safety and convenience problems created by groups of picketers assembled on the narrow residential streets of Brookfield confirm that prohibiting picketing there is both reasonable and well within the Town's police power.

This Court has repeatedly upheld prohibitions upon particular expressive activity, including picketing, where the activity interferes with public interests no more compelling than the ones at stake here.[7] For example, in

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[6] For example, in *United States Labor Party v. Oremus*, 619 F.2d 683, 686 (7th Cir. 1980), the court upheld an Illinois statute prohibiting persons from standing on a "highway for the purpose of soliciting employment, business or contributions from the occupant of any vehicle." The court noted the argument that "the [government] could serve [its] interest through a less restrictive means by punishing only those who actually disrupt traffic or engage in unsafe behavior," but held that "[t]he State need not wait for personal injuries." *Id.* at 688 n.4.

[7] The Court has recognized that certain interests asserted by the federal government, for example containing labor discord, will take precedence over an asserted right to picket. *See, e.g., NLRB v. Retail Store Employees Union, Local 1001 (Safeco)*, 447 U.S.

Cox v. Louisiana, 379 U.S. 559 (1965), the Court sustained a statute prohibiting picketing and parading in or near courthouses. The Court observed that "a State has a legitimate interest in protecting its judicial system from the pressures which picketing near a courthouse might create." *Id.* at 562. The Court then added:

> The conduct which is the subject of this statute—picketing and parading--is subject to regulation even though intertwined with expression and association. The examples are many of the application by this Court of the principle that certain forms of conduct mixed with speech may be regulated or prohibited.

Id. at 563.[8] Protecting the judicial system from the real or perceived pressures that picketing might create is surely a substantial governmental interest. Protection of privacy and domestic tranquility around the homes of our citizens is no less significant.

In *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984), the Court upheld a Los Angeles ordinance prohibiting posting of any signs, including political signs, on public property, observing that cities "have a weighty, essentially esthetic interest in proscribing intrusive and unpleasant formats for expres-

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607, 616 (1980) (plurality opinion of Powell, J.); *id.* at 616-18 (Blackmun, J., concurring); *id.* at 618-19 (Stevens, J., concurring). *Cf. Finzer v. Barry*, 798 F.2d 1450 (D.C. Cir. 1986), *cert. granted sub nom., Boos v. Barry*, 107 S.Ct. 1282 (1987) (foreign policy considerations support statute prohibiting display of signs bringing foreign government into disrepute and congregating within 500 feet of embassy). *Carey v. Brown*, 447 U.S. at 470-71, precludes any suggestion that the governmental interests at stake here—residential tranquility, privacy, and public safety—are not equally substantial.

[8] *See also Concerned Jewish Youth v. McGuire*, 621 F.2d 471 (2d Cir. 1980), *cert. denied*, 450 U.S. 913 (1981) (upholding restrictions on demonstrations at Russian Mission to the United Nations, relying, in part, on the privacy interests of residents living nearby).

sion." 466 U.S. at 806.[9] The Court described the accumulation of signs on public property as a "visual assault on the citizens of Los Angeles," and thus a "significant substantive evil within the City's power to prohibit." *Id.* at 807. In this case, the residents of Brookfield seek protection not only from the "visual assault" of picket signs, but also from the jeering, shouting, and physical and verbal intimidation which naturally accompany picketing. See, *e.g.*, J.A. 60-67; 80-84.

In *Kovacs v. Cooper*, 336 U.S. 77 (1949), the Court upheld the constitutionality of a municipal ordinance prohibiting sound trucks from broadcasting in a loud and raucous manner upon the streets. Justice Reed's plurality opinion noted that while "[c]ity streets are recognized as a normal place for the exchange of ideas by speech or paper[,] . . . this does not mean the freedom is beyond all control." *Id.* at 87. The plurality further observed that "in the residential thoroughfares the quiet and tranquility so desirable for city dwellers would . . . be at the mercy of advocates of particular religious, social or political persuasions. We cannot believe that rights of free speech compel a municipality to allow such mechanical voice amplification on any of its streets." *Id.* at 87.

Ultimately, the residential tranquility, privacy, and public safety interests of Brookfield's residents must be weighed against the very limited restriction that the Brookfield ordinance imposes upon appellees' expressive activity. "[T]he nature of the forum and the conflicting interests involved have remained important in determining the degree of protection afforded by the [First] Amendment to the speech in question." *Lehman v. City of Shaker Heights*, 418 U.S. at 302-03. The Brookfield

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[9] The Court expressly reaffirmed the conclusion of a majority of the Members of the Court in *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981), that the City's interest in esthetics justified a prohibition against the use of billboards. *See Taxpayers for Vincent*, 466 U.S. at 806-07.

ordinance does not in any way restrict marches through the neighborhood, distribution of leaflets in the neighborhood, door-to-door informational campaigns or solicitations, neighborhood meetings in parks or homes, or, for that matter, use of other media such as direct mail or telephone calls to residents, or radio, television, or newspaper appeals. See J.S. App. A-21 to A-22. Picketing activity is the only expressive activity proscribed, and only in a limited geographic area "before or about the residence or dwelling" of Brookfield's citizens—not in other areas of Brookfield or, of course, in front of Dr. Victoria's Appleton and Milwaukee clinics.

The weighing of competing interests also must take account of those characteristics that make picketing activity subject to stricter governmental regulation than other forms of expression. This Court has recognized "the compulsive features inherent in picketing, beyond the aspect of mere communication." *Hughes v. Superior Court*, 339 U.S. 460, 468 (1950). Indeed, "the very purpose of a picket line is to exert influences, and it produces consequences, different from other modes of communication." *Id.* at 465. *See also NLRB v. Retail Store Employees Union, Local 1001 (Safeco)*, 447 U.S. 607, 619 (1980) (Stevens, J., concurring) (picketing invites "an automatic response to a signal, rather than a reasoned response to an idea"); *Bakery Drivers Local v. Wohl*, 315 U.S. 769, 776-77 (1942) ("Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated. Hence, those aspects of picketing make it the subject of restrictive regulation.").[10] Because of these distinctive features, picketing is not

[10] In this case, for example, the picketers prevented family members from leaving their home, photographed the children, trespassed upon their property, and intimidated and harassed their neighbors. See J.S. App. A-10 to A-12; J.A. 60-64, 76-84.

afforded the same protection under the First Amendment as some other forms of expression. "We emphatically reject the notion . . . that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech." *Cox v. Louisiana*, 379 U.S. at 555.

In sum, appellees' picketing activity is "basically incompatible" (*Grayned v. City of Rockford*, 408 U.S. at 116) with the residential streets of Brookfield, Wisconsin. Many other forms of expressive activity may be tolerated in such locations consistent with the domestic tranquility, privacy, and public safety of the residents, but it is clear that picketing is consistent with none of these vital values and may be prohibited.

> So long as a legislature does not prescribe what ideas may be noisily expressed and what may not be, nor discriminate among those who would make inroads upon the public peace, it is not for us to supervise the limits the legislature may impose in safeguarding the steadily narrowing opportunities for serenity and reflection. Without such opportunities freedom of thought becomes a mocking phrase, and without freedom of thought there can be no free society.

Kovacs v. Cooper, 336 U.S. at 97 (Frankfurter, J., concurring).

II. EVEN IF PROPERTY IMMEDIATELY ADJACENT TO PRIVATE HOMES IN RESIDENTIAL AREAS CONSTITUTES A TRADITIONAL PUBLIC FORUM, BROOKFIELD'S ORDINANCE IS A PERMISSIBLE REGULATION OF THE PLACE AND MANNER OF EXPRESSIVE ACTIVITY.

Assuming that the Court determines to analyze this case by finding, as a threshold matter, that the property adjacent to Brookfield's residences constitutes a traditional public forum, the picketing ordinance must still be sus-

tained because it is a reasonable regulation of the place and manner of particular expressive activity. In the context of traditional public forums, this Court has held that a State may "enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Perry Education Ass'n*, 460 U.S. at 45.

A. Content Neutrality.

In *Carey v. Brown, supra*, the Court invalidated, on equal protection grounds, an Illinois statute that prohibited residential picketing but exempted labor picketing. The Court expressly reserved the question "whether a statute barring all residential picketing regardless of its subject matter would violate the First and Fourteenth Amendments." 447 U.S. at 459 n.2. This case squarely presents that question. There can be no serious dispute that the Brookfield picketing ordinance is content-neutral. As the district court observed:

> All residential picketing, regardless of the cause on behalf of which it is conducted, is unlawful in the Town of Brookfield. I see little merit in plaintiffs' argument that an implied exception for labor picketing must be read into an ordinance, the legislative history of which shows a precisely contrary intent.

J.S. App. A-17. Thus, unlike the statute invalidated in *Carey v. Brown*, the Brookfield ordinance makes no distinctions between picketing on the basis of content or subject.[11]

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[11] Appellees' equal protection argument rests upon an attempt to have this Court construe state law as modifying the scope of the ordinance by exempting labor picketing. This Court, however, "rarely reviews a construction of state law agreed upon by the two lower federal courts." *Virginia v. American Booksellers Ass'n*, 108 S.Ct. 636, 643 (1988). *See Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 499-500 (1985), and cases cited therein. Because the ordinance "appears on its face to be content neutral and completely without exception in its application" (Motion to Affirm 23), there is no basis for an equal protection challenge.

B. Narrow Tailoring That Serves Significant Government Interests.

The requirement that a law affecting expressive activity be narrowly tailored to serve a significant government interest means simply that the scope of the enactment "may extend only as far as the interest it serves." [12] *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557, 565 (1980). For example, in *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984) ("*CCNV*"), this Court found that application of Park Service regulations to prevent sleeping in tents erected in Lafayette Park constituted "a reasonable regulation of the manner in which a demonstration may be carried out." *Id.* at 297. The Court suggested that perhaps the governmental objectives might "be more effectively and not so clumsily achieved by preventing tents

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[12] Appellees also attack the Brookfield ordinance on grounds of "overbreadth." The "overbreadth" doctrine traditionally has been understood to allow a litigant "whose own conduct is unprotected to assert the rights of third parties to challenge a statute, even though 'as applied' to him the statute would be constitutional." *Secretary of State of Maryland v. J.H. Munson Co.*, 467 U.S. 947, 965 n.13 (1984). This aspect of the overbreadth doctrine is inapplicable here because appellees do not concede—or even suggest *arguendo*—that the ordinance is constitutional as applied to them. The "overbreadth" doctrine "has also been used to describe a challenge to a statute that in all its applications directly restricts protected First Amendment activity and does not employ means narrowly tailored to serve a compelling governmental interest." *Id.* If appellees intend by the use of the term "overbreadth" to invoke this aspect of the doctrine, their challenge is answered by this section of the brief. *Amici* submit that there is no reason to utilize the overbreadth doctrine where the traditional time, place, and manner test results in essentially the same analysis. *Cf. Taxpayers for Vincent*, 466 U.S. at 802 (declining to consider overbreadth challenge that was basically the same as an as-applied challenge).

and 24-hour vigils entirely in the core areas," and noted that the Park Service permitted other "non-sleeping demonstrations" on Lafayette Park grounds that might arguably have caused similar damage to park property. *Ibid.* The Court nonetheless found that the regulation " 'responds precisely to the substantive problems which legitimately concern the [Government].' " *Ibid.* (*quoting Taxpayers for Vincent*, 466 U.S. at 810). The Court flatly rejected the court of appeals' determination that the regulation was not narrowly tailored because other alternatives less restrictive of expressive activity could have satisfied the government's interest in preserving park lands, for example, limiting the size, duration, or frequency of the demonstrations. The Court characterized these suggestions as (*id.* at 299)

> no more than a disagreement with the Park Service over how much protection the core parks require or how an acceptable level of preservation is to be attained. We do not believe, however, that . . . the time, place, or manner decisions assign to the judiciary the authority to replace the Park Service as the manager of the Nation's parks or endow the judiciary with the competence to judge how much protection of park lands is wise and how that level of conservation is to be attained.

Similarly, in this case, the Brookfield ordinance addresses precisely the domestic tranquility, privacy, and public safety concerns raised by picketing adjacent to the residences of the Town's citizens by prohibiting picketing only in that zone. This Court has repeatedly recognized that even peaceful picketing may cause certain disturbances or be inimical to the purpose for which surrounding property has been dedicated. *See, e.g., Carey v. Brown*, 447 U.S. at 465; *Cox v. Louisiana*, 379 U.S. at 554-55. Given the inherent nature of picketing (see pp. 13-16, 18-19, *supra*), the residents of Brookfield are entitled to view the presence of picketers looming in front of their homes for hours on end as an intolerable intrusion upon residential tranquility and privacy and to pro-

hibit such behavior. *Cf. Carey v. Brown*, 447 U.S. at 478 (Rehnquist, J., dissenting), citing *Wauwatosa v. King*, 49 Wis. 2d 398, 411-12, 182 N.W.2d 530, 537 (1971).[13]

The substantial evils here—the violation of residential tranquility and privacy and the public safety hazards—just like the visual blight unlawfully banned from all public property in *Taxpayers for Vincent*, are "not merely a possible byproduct of the activity, but [are] created by the medium of expression itself." *Taxpayers for Vincent*, 466 U.S. at 810. Even if it were possible to quibble about the precise parameters of the restriction upon picketing necessary to alleviate fully the harm in this case, this Court's decision in *CCNV* indicates that the judiciary shall not substitute its judgment for the decision of elected or appointed officials whose job it is to determine how much protection is wise and how it shall be achieved. *See* 468 U.S. at 299.

C. Availability Of Ample Alternative Channels Of Communication.

The Brookfield ordinance leaves appellees with ample channels of communication. In examining whether remaining modes of communication are "inadequate," this Court has looked to whether the advantages of the foreclosed medium can be obtained through other means and whether the foreclosed medium is "a uniquely valuable or important mode of communication." *Taxpayers for Vincent*, 466 U.S. at 812. It cannot fairly be disputed that the Brookfield ordinance preserves adequate means for appellees to make their views known to the intended audience of the picketing. As noted above, appellees are free to engage in marching, neighborhood leafletting and solicitations, hold meetings and rallies in parks and

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[13] " 'To those inside . . . the home becomes something less than a home when and while the picketing . . . continue[s] . . . . [T]he tensions and pressures may be psychological, not physical, but they are not, for that reason, less inimical to family privacy and truly domestic tranquility.' "

homes, and use the mails, telephone, radio, television, and newspapers to advance their views. They are also free to picket elsewhere. Perhaps the only unique feature of the restricted mode of expression—group picketing adjacent to the residences of Brookfield—is its ability to invade the privacy of the home and to shatter the peace and quiet of the neighborhood. The First Amendment does not require that the available channels be equally capable of destroying the residential tranquility and privacy of Brookfield's residents.

D. Brookfield's Ordinance Is A Permissible Exercise Of The Community's Police Power To Protect Residential Tranquility And Privacy By Restricting Certain Activity In Particular Locations.

The Brookfield ordinance also may be viewed as an appropriate geographic limitation of a certain type of speech-related conduct within the jurisdiction of the Town to enhance the quality of life for its residents. A town's "interest in attempting to preserve the quality of urban life is one that must be accorded high respect." *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71 (1976) (plurality opinion) In *Young*, this Court held that Detroit's zoning ordinance which, *inter alia*, prohibited locating adult theaters within five hundred feet of any residential zone did not violate the First or Fourteenth amendments. 427 U.S. at 52, 72-73 (plurality opinion); *id.* at 84 (Powell, J., concurring). Similarly, in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), the Court sustained a zoning ordinance prohibiting adult motion picture theaters, concededly a mode of expression protected by the First Amendment, from locating within one thousand feet of any residential zone, single or multiple-family dwelling, church, park, or school. *Id.* at 43-47. The Court found that the ordinance was content neutral, designed to serve a substantial government interest, and did not unreasonably limit alternative avenues of communication, notwithstanding that only approximately five

percent of the land in Renton remained available for the location of adult theaters. *Id.* at 53-54.

> Renton has not used "the power to zone as a pretext for suppressing expression," but rather has sought to make some areas available for adult theaters and their patrons, while at the same time preserving the quality of life in the community at large by preventing those theaters from locating in other areas. This, after all, is the essence of zoning.

Id. at 54 (citation omitted).[14]

The Brookfield ordinance represents a similar lawful effort to limit a particular form of expressive activity to areas where it would not degrade the quality of residential life. *Amici* suggest that the community interests that support the constitutionality of a zone free of adult theaters support equally the creation of a residential zone free of picketing.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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[14] This Court in *Renton* applied the same standard of inquiry as it has applied in public forum cases. *See Renton*, 475 U.S. at 47 (citing and utilizing public forum standard in *CCNV*, 468 U.S. at 293).